NO. 43786-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GARY ALLEN LOHR,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to grant a mistrial after the state elicited evidence that the defendant had just been released from prison for the same offense.

Issues Pertaining to Assignment of Error

Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to grant a mistrial after the state elicits evidence that the defendant had just been released from prison for the same offense when no subsequent instruction could ameliorate the taint the evidence created?

STATEMENT OF THE CASE

Factual History

On October 24, 2011, 65-year-old defendant Gary Allen Lohr was released from prison following the completion of his sentence imposed by the Lewis County Superior Court on a number of felony charges, including a charge of possession of methamphetamine. RP 167-170.[1] According to the defendant, he had spent over 20 years living a clean and sober life and working for the state as a counselor at the Green Hill juvenile incarceration center. RP 155-160. However, following the death of one of his daughters he began drinking heavily and abusing prescription drugs. RP 161-165. Upon the defendant's return, he found that a number of transients had "trashed" his house to the point that he could not live there. RP 167-170, 277-284. In fact, the sheet rock had been ripped off the walls to get to the copper wiring and pipes, and there was garbage, filth and drug paraphernalia strewn about the house. RP 167-170, 285-289. As a result, when he was released from prison, he lived with a friend by the name of Clarence "Mike" Robbins and worked for a carpet cleaning business. RP 167-170. According to the defendant, he had been able to again overcome his addictions in prison, and lived a clean and sober lifestyle once he was released. *Id.*

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[1]The record on appeal includes four continuously numbered verbatim reports of the pretrial motions, the trial, and the sentencing hearing in this case. They are referred to herein as "RP [page #]."

On December 9, 2011, about six weeks after his release, the defendant was at his house with a couple of friends by the names of Billie Thomas Orr and Steve Merrill working on cleaning up the mess. RP 170-178. Mr. Merrill was a demolition contractor and the defendant's wife had paid him to help in the cleanup. RP 277-284. At about 6:00 pm, "Mike" Robbins stopped by to pick the defendant up and give him a ride so he could retrieve his vehicle from his wife's home where she lived with her boyfriend. RP 174-176, 253-257. As the defendant left his house, Mr. Orr handed him a jacket to wear as it was quite cold outside. RP 113-115, 174-176, 285-289. According to Mr. Orr, Mr. Merrill and the defendant, this item was one of a number of dirty jackets and other cast off clothes that transients had left in the house and that they had gathered up to take to Goodwill. RP 107-115, 170-176, 285-289. Once the defendant put on the coat, he folded some paperwork he had and put it in the pocket.174-176.

Upon entering the waiting vehicle, Mr. Robbins noted that the jacket smelled terrible and the defendant explained where he got it. RP 258-260. Mr. Robbins then took the defendant to his wife's residence so he could pick up his old Blazer and drop it off at the train terminal where his daughter was going to pick it up later. RP 174-176, 256-257. He wanted to do this because his wife had told him that he could no longer store the vehicle at her house, he didn't have a license and shouldn't drive it, and his daughter did

have a license and could use the vehicle. RP 312-313. The defendant admitted that he knew he shouldn't be driving but felt compelled to take the vehicle before it was towed from his wife's residence as her boyfriend had parked it on the street. *Id.*

While driving the vehicle to the train station, the defendant by chance drove down a street where two Centralia Police Officers were checking a suspicious vehicle. RP 28-35, 57-62. Although it was dark, one of the officers recognized him as he passed their locations and the other officer got his license number. *Id.* A check of the license number and the defendant's name revealed that the car license had expired and that the defendant's right to drive was suspended in the third degree. *Id.* Upon confirming this information, both officers got into their respective vehicles and drove in the direction that the defendant had driven. *Id.* Within a minute or two, the first officer saw Mr. Robbins pass by driving his white truck with the defendant in the passenger seat. RP 32-35. He then radioed to the other officer to stop the truck and arrest the defendant. *Id.* While the second officer did this, the first officer located the defendant's red Blazer in the parking lot of the train station. *Id.*

After locating the defendant's vehicle, the first officer responded to the location where the second officer had stopped the white truck and arrested the defendant. RP 35. Once the second officer arrested and

handcuffed the defendant, she searched his person incident to arrest and found the paperwork in the front right pocket of the jacket, along with a small baggie with methamphetamine residue in it. RP 36-39, 60-62. The officers then took the defendant to the Lewis County jail where he was booked for driving while suspended and possession of methamphetamine. RP 43.

Procedural History

By information filed December 12, 2011, the Lewis County Prosecutor charged the defendant Gary Allen Lohr with one count of possession of methamphetamine. CP 1-2. At arraignment on December 22, 2011, the trial court set an omnibus hearing for February 2, 2012, a trial review date of March 1, 2012, and a jury trial for March 5, 2012. *See* Trial Exhibit 8. The defendant signed a Criminal Docket Notice acknowledging these dates. Trial Exhibit 9. Although the defendant did appear with his court-appointed attorney for omnibus on February 2nd, he did not appear for his March 1st trial review. RP 88-89; Trial Exhibit 11. As a result the trial court struck the March 5th trial date and ordered a warrant for the defendant's arrest. *Id.*

The defendant was later arrested on March 5th pursuant to the warrant and he appeared before the court on March 8th, at which time the court set a new trial date. RP 93-94; Trial Exhibit 15. Prior to the new trial date the state amended the information to add a count of bail jumping, and the

defendant's court-appointed attorney was allowed to withdraw after the defendant retained his own attorney. CP 13-15, 32-33, 35.

This case eventually came to trial before a jury on July 23, 2012. CP 43-63. Just prior to the beginning of the trial, the defendant argued a motion to suppress without the presentation of evidence. RP 9-11. Although not specifically stated, the parties appear to have submitted the motion to the court with an implicit agreement that the trial court accept the facts as alleged in the police reports that the defense had attached to its original written motion. CP 19, 20-27; RP 9-11. Based upon these facts, the defense argued that the officers had violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, when they made a custodial arrest for third degree driving while suspended when they should have merely cited and released him. RP 9-11. Following the state's response, the trial court denied the motion. *Id.*

In addition, during unrecorded pretrial motions in chambers, the defense apparently moved *in limine* to preclude the state from eliciting the fact of the defendant's prior methamphetamine conviction either as substantive evidence or as impeachment evidence under ER 609 and the court apparently granted the motion. RP 14. The fact of this motion and ruling was later mentioned on the record as follows:

> THE COURT: Anything from the defense, Mr. Hershman?

> MR. HERSHMAN: If I can have a moment, please. The record will reflect that prior to going on record today we had a brief in camera conference in Your Honor's chambers. And I had intended to bring a motion *in limine* regarding bad conduct involving my client, meaning if he's a methamphetamine user, does he have prior contacts with law enforcement and the like.
>
> In view of the record that's been made here today by the State and in view of representations made *in camera*, that's not relevant at this time because as I understand it The Court has telegraphed that that sort of evidence will not come in in the case in chief and we will have to wait to deal with those issues when and if the door is opened during the case in chief of the defense case. So I have no other motions apart from that.
>
> THE COURT: Just so we're clear, I have not telegraphed. I have specifically ruled that the State cannot do that.

RP 14 (italics added).

During the trial that followed the suppression and pretrial motions the state called three witnesses: the two arresting officers and a clerk of the court. RP 28, 56, 79. The defense then called five witnesses: Billie Thomas Orr, the defendant, Clarence Robbins, Steve Merrill and one other person. RP 106, 155, 252, 270-, 276. All of these witnesses testified to the facts set out in the previous factual history. *See* Factual History. During cross-examination of the defendant and without leave of the court, the state specifically elicited the fact that one of the prior convictions that sent the defendant to prison was for possession of methamphetamine that the police found in a baggie in his wallet when they searched his house. This exchange went as follows:

Q. All right. You told counsel about a 2009 incident where you got in some trouble when a warrant was being served at your house; is that right?

A. A search warrant, yes.

Q. All right. And your testimony was that you personally were only using prescriptions and marijuana, things that you deemed to be not illegal at that time; is that right?

A. Yeah. That's what I was using.

Q. But then you told counsel that you did get in some trouble for a methamphetamine issue out of that case; isn't that right?

A. There was methamphetamines there. I wasn't using methamphetamines.

Q. Now, Mr. Lohr, I want you to be very clear about this. That incident that got you into trouble, where was that methamphetamine, according to you?

A. I don't know. I don't know where it was found. It was found in my house.

Q. Now, isn't it true, Mr. Lohr, that in fact that methamphetamine was found by law enforcement inside of a wallet in a jacket pocket of yours; isn't that correct?

A. I don't recall.

Q. All right. Well –

RP 230.

At this point defense counsel objected and moved for a mistrial, and then for dismissal under CrR 8.3. RP 230. Upon hearing the objection, the court excused the jury for its lunch break and allowed argument from counsel

on the motion. RP 244. The defense then made the following three claims in support of its request for a mistrial or dismissal: (1) that the state had intentionally violated a pretrial order prohibiting the introduction of this evidence, (2) that the evidence was more prejudicial than probative, and (3) that the evidence was so prejudicial that no curative instruction could assure the defendant a fair trial. RP 230-244. Ultimately, the trial court agreed that the state had violated the court's pretrial ruling prohibiting the introduction of this evidence and that the evidence was inadmissible as it was more prejudicial than probative. RP 246-250. However, the court denied both the motion for a mistrial and the motion to dismiss under CrR 8.3, finding that a curative instruction would be sufficient to assure the defendant a fair trial. *Id.*

Once the jury returned from lunch, the court gave the following instruction:

> THE COURT: Go ahead and be seated. All right. When we broke for lunch, Mr. Lohr was on the stand and there was some discussion going on about the 2009 methamphetamine case. You are to disregard any questions or any testimony regarding the alleged facts of the prior methamphetamine case.

RP 252.

Following the reception of evidence in this case the court instructed the jury with the defense objecting to the court's failure to require the state to prove that the defendant "knowingly" possessed the drugs in question as

part of the "to convict" instruction on the methamphetamine charge. RP 372-376. Counsel then presented closing argument and the jury retired for deliberation. RP 468-473. The jury eventually returned verdicts of "guilty" on the possession of methamphetamine charge as well as "guilty" on the bail jumping charge. RP 476-477; CP 123-124. The court later imposed concurrent sentences within the standard range on each count, after which the defendant filed timely notice of appeal. CP 129-138, 140.

ARGUMENT

THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO GRANT A MISTRIAL AFTER THE STATE ELICITED EVIDENCE THAT THE DEFENDANT HAD JUST BEEN RELEASED FROM PRISON AFTER BEING CONVICTED OF THE SAME OFFENSE FOR WHICH HE WAS CURRENTLY CHARGED.

While due process does not guarantee every person a perfect trial, both our state constitution under Washington Constitution, Article 1, § 3, and our federal constitution under United States Constitution, Fourteenth Amendment, do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine

whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

> the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In the case at bar, the state charged the defendant with possession of

methamphetamine residue in a baggie in the pocket of a coat he was wearing. The defendant responded with the affirmative defense of unwitting possession under a claim that the he did not know that the baggie was in his pocket. He did not claim during his testimony at trial that he did not know what methamphetamine was. In violation of a specific pretrial order *in limine* and over specific defense objection, the state elicited evidence from the defendant that at the time of his prior arrest, the police found a baggie of methamphetamine in his jacket which they found while searching his home. As reference to the decision in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), reveals, this evidence was inadmissible because it merely showed a propensity to commit the crime charged and it was more prejudicial than probative.

In *Pogue*, *supra*, the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in

your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

> The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome

of the trial, the court reversed and remanded the case for a new trial.

The findings in *Pogue* are precisely on point under the facts in the case at bar. The defendant's prior methamphetamine conviction was no more relevant than the defendant's prior drug use was in *Pogue*. In addition, the prejudicial effect of admitting the defendant's prior methamphetamine conviction in the case at bar was at least as large as the prejudicial effect of admitting the defendant's prior drug use in *Pogue*. Thus, in the same manner that the admission of such evidence denied the defendant in *Pogue* a fair trial and required reversal, so in the case at bar the admission of this evidence denied the defendant a fair trial and should require reversal. Consequently, while the trial court did not err in finding that the evidence was inadmissible and that the state had violated a pretrial order by eliciting it, the trial court did err when it denied the defendant's motion for a mistrial.

This error was exacerbated by the erroneous limiting instruction that the trial court gave which actually invited the jury to use the defendant's prior conviction for possession of methamphetamine as propensity evidence to support a conclusion that he committed the current crime of possession. In this case, the court gave the following limiting instruction:

> THE COURT: Go ahead and be seated. All right. When we broke for lunch, Mr. Lohr was on the stand and there was some discussion going on about the 2009 methamphetamine case. You are to disregard any questions or any testimony regarding the alleged facts of the prior methamphetamine case.

RP 252.

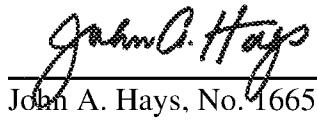
The problem with this instruction was that it only prohibited the jury from using "the facts of the prior methamphetamine case" as evidence in the current trial. It did not prevent the jury from using the fact of the prior conviction as evidence. The "facts of the prior methamphetamine case" were that the police had found the methamphetamine in a baggie in the defendant's wallet when they searched his home. The "facts" were quite similar to the facts in the case at bar in which the police again found a baggie of methamphetamine in a jacket the defendant was wearing. However, the underlying fact of the prior conviction for possession of methamphetamine was also extremely prejudicial. Once again, the problem with the court's instructions was that by telling the jury that it could not consider the "facts of the prior methamphetamine case" it implicitly invited the jury to consider the fact of the conviction Thus, the trial court's limiting instruction exacerbated the prejudicial effect of the facts that the state elicited.

CONCLUSION

The state's introduction of improper propensity evidence denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant's conviction and remand for a new trial.

DATED this 11th day of March, 2013.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

ER 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 404

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,**	**COURT OF APPEALS NO: 42481-9-II**
vs.	**AFFIRMATION OF SERVICE**
LOHR, Gary Allen, **Appellant.**	

STATE OF WASHINGTON)
) **: ss.**
County of Lewis)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **March 11th, 2013**, I personally placed in the mail and/or e-filed the following documents

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to the following:

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Dated this 11TH day of March, 2013 at LONGVIEW, Washington.

/s/

CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

HAYS LAW OFFICE

March 11, 2013 - 2:38 PM

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